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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 217

RALPH KOPELOVE AND RALPH SCHEAR,
Petitioners,

vs.

JOE SHERMAN, MAX ROBINSON AND S. H. ROBINSON & COMPANY.

BRIEF OF RESPONDENTS IN OBJECTION TO PETITION FOR WRIT OF CERTIORARI.

JOHN JENNINGS, JR.,
Counsel for Respondents.

W. L. AMBROSE, JR.,
JENNINGS, O'NEIL & JARVIS,
Of Counsel.

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I.

Objections of Respondents to Grounds on Which the Jurisdiction of the Supreme Court of the United States Is Invoked.

The Supreme Court of Tennessee in its written opinion, which appears for publication in 177 S. W. (2d) at page 19 and will be reported in Vol. 180 of the Tennessee State Reports when published, after stating the facts of the case had this to say:

> "The record discloses that defendants came into this juris (fol. 229) diction (Tennessee) to enforce collection on the note or the foreign judgment; that they

employed an attorney to reduce the note to judgment here or to enforce the foreign judgment; and that in addition to making publication for these two defendants, the attorney of record in the circuit court for these same two defendants was served with written notice of the present cause. The defendants cannot now be heard to say that their constitutional rights, or failure to have notice and an opportunity to be heard, have been violated.

"It results that we find no error in the decree of the chancellor and it is affirmed" R. 157.

Petitioners state no reason why this Honorable Court should take jurisdiction in the instant case. It is urged by the petitioner that the Supreme Court of Tennessee by approving the case of *Morrow* v. *Fossick,* 71 Tennessee (3 Lea) 128, overrules *Sanders* v. *Armour Fertilizer Works,* 292 U. S. 190; 78 L. Ed. 1206, but these cases and the other cases cited on page 16 of the petition for certiorari are not in conflict, but the decisions are grounded on material differences in fact.

No reason exists for granting the writ in the sound judicial discretion of this Honorable Court under rule 38, subsection 5a. No Federal question of substance not heretofore determined by this Court is involved nor has the Supreme Court of Tennessee decided this case in a way not in accord with applicable decisions of this Court.

The question presented is one involving the asset of a Tennessee partnership on which one of the petitioners in conspiracy with the other sought to obtain judgment against two of the respondents herein by coming into the jurisdiction of Tennessee. It appears on the face of the petition for certiorari that the judgment of the Supreme Court of Tennessee complained of depended upon the previous decisions of the State Court and the judgment of the State Court in the case at bar did not depend upon the decision of a Federal question.

Statement of the Case.

Petitioners, in their summary of the substance of the pleadings and statement of the facts and in the questions presented, omit certain facts and circumstances which help to place the conduct of the parties in proper perspective. Accordingly respondents present the following brief summary of the case:

The undisputed record discloses that the respondent, Sherman, and the petitioner, Kopelove, were partners; that Sherman was a resident of Tennessee and Kopelove a non-resident of Tennessee but the partnership assets were in the State of Tennessee. See contract between Sherman and Kopelove as partners on the one hand and S. H. Robinson and Company, Inc., on the other hand filed as exhibit to answer and cross bill—Record pages 26-28.

Thereafter, the only asset of the partnership, consisting of the partnership contract with Lenoir Car Works, was sold to Robinson and a note was executed in the name of Kopelove (See Tr. page 67). Robinson tells the details of the transaction in his testimony. It appears that it was discussed at that meeting when the note was executed, which meeting was attended by Schear, Kopelove and Sherman, as well as Robinson, that Joe Sherman was a partner entitled to one-half of the proceeds of the note and that his one-half of the proceeds of the note would be paid over to him (R. pages 53 and 54). After the note had been executed under the circumstances which appeared in the proof, Robinson began paying the note on a monthly basis and paid off Two Thousand ($2,000.00) Dollars by checks (Record pages 64-66).

On November 7, 1942, the original bill was filed wherein Ralph Kopelove and Max Robinson were made parties defendant and the facts with reference to the partnership

agreement and the sale of the partnership asset to Robinson were set out in the bill (R. pages 1-6). This process was served on Robinson and a non-resident attachment notice for Kopelove published in the local newspaper.

On November 10, 1942, counsel for complainant notified Kopelove by letter advising him of the fact that a suit had been brought against him and on learning of the institution of suit Kopelove, accompanied by Schear, the other respondent, came to Knoxville on November 17, 1942, accompanied by their common attorney, Ralph Skilkin, to see the respondent, Sherman (R. pages 54, 61, 62, 63). They did not call on Sherman's lawyer, and failing to find Sherman in town, they talked to Robinson *and advised him that Kopelove still had the note* and wanted to settle with Sherman for One Thousand ($1,000.00) Dollars. As above stated, Sherman was not in town and then these three conspirators tried to employ a Knoxville lawyer, Max Morrison, who refused to handle the case.

On November 20, 1942, after the three conspirators had returned to Dayton, Ohio, Schear, acting through his attorney, Skilkin, entered the confessed judgment in Ohio (R. page 24).

On December 5, 1942, W. W. Piper, an attorney at Knoxville, wrote a letter to Robinson in which he said that the Dayton, Ohio, attorney for Ralph Schear (Skilkin) had sent him the note for collection (R. pages 66-68). He further states that when the papers were sent to him he learned "that Joe Sherman had brought suit in the Chancery Court at Knoxville against Ralph Kopelove and Max Robinson, seeking to attach by garnishment monies owing by Max Robinson to Ralph Kopelove, and see by the papers in court that an injunction was served upon Max Robinson alone and garnishment likewise served under an attachment" (R. page 67). Counsel for the petitioner is now undertaking

by assignments of error in this Court to convince the court that garnishment was not served under an attachment although he admits this was true in December of 1942. He likewise makes a compelling admission in this matter to the effect that it was not Kopelove's intention to appear in the Tennessee case (R. page 68). At this time counsel presumably was only representing Schear and that fiction was continued until finally the joint writ of error was filed in behalf of both petitioners herein in the Supreme Court of Tennessee and it is an inescapable fact that he was representing both of these conspirators as far back as December 3, 1942, and up until the present time.

On January 5, 1943, Ralph Schear filed a suit in the Second Circuit Court of Knox County against Max Robinson and S. H. Robinson and Company and as a basis for the action exhibited a copy of the note and made profert thereof and also sued on the purported confessed judgment entered on November 20, 1942 (R. page 24). This suit on the note was likewise filed in Knox County through the same attorney, Piper, and the declaration was in two counts, the first count suing on the purported confessed judgment, and the second count on the note itself (See Record page 24).

On March 1, 1943, Joe Sherman filed an amended and supplemental bill joining in as parties defendant, Ralph Schear and S. H. Robinson and Company (R. page 10). The complainant prayed that an injunction issue against Schear and be served upon his attorney and enjoining the said Schear from proceeding further in the suit in the Second Circuit Court against the Robinsons and to require the claim, if any, of said Schear, to be prosecuted in the Chancery Court in order to avoid a multiplicity of suits and so that justice may be done all the parties (R. 15). Immediate notice of the filing of this amended and supplemental bill was given to Attorney Piper on March 1, 1943

(R. page 45). However, on March 8, 1943, plaintiff, Schear, acting by and through his attorney, in violation of the injunction and in what was in effect a contempt of the Chancery Court process, undertook to enter a judgment by default in Tennessee for the amount of the note with interest and costs totaling Two Thousand Five Hundred Fifty-Eight Dollars and Thirty-Seven Cents ($2,558.37) (R. 35 and 36). While the Record apparently indicates that this judgment was entered on March 8, 1943, yet the answer of Jessie Marie Miller, the Circuit Court Clerk, indicates that it was not actually taken until March 9, 1943 (R. page 31), so it appears that Schear was undertaking to make the litigation in Tennessee a race of the swift and undertook to circumvent the jurisdiction of the Chancery Court by entering a default judgment against the Robinsons who were then seeking the protection of the Chancery Court by the filing of an answer and cross bill which they did file on March 10, 1943 (R. page 20). The default judgment did not help Schear in any way since it would have been necessary for the parties filing the bill of interpleader to confess judgment in the Circuit Court case. In the cross bill the respondents, S. H. Robinson & Company, and Max Robinson, prayed that Ralph Schear by and through his Attorney, Piper, be forthwith enjoined from prosecuting his suit against them in the Second Circuit Court for Knox County, Tennessee, further than to judgment and that Schear be required to come into the Chancery Court and establish his claim to the fund in question (R. page 25). On April 6, 1943, the attorney for Schear and Kopelove undertook to file what was denominated an answer for the Circuit Court Clerk (R. pages 31-34).

Undertaking to answer the bills filed in the Chancery Court in this manner, Schear and Kopelove, through their attorney, made all the defenses which they undertook to set

up in the writ of error to the Tennessee Supreme Court. The same suggestion which had been made in Piper's letter of December 5, 1942, appears in the purported answer of Jessie Marie Miller (R. page 34). Piper in his letter of December 5th had suggested to the Robinsons how the Robinsons should answer this suit brought against them (R. page 68). However, in a consideration of this case the special facts touching upon the case at Bar must be kept in mind. The note in question, which was the only asset of the partnership, had been executed in the name of Kopelove and was signed by Robinson. It was discussed at the time of the execution of the note and agreed in the presence of Schear, Kopelove, Sherman and Robinson, that Joe Sherman was a partner entitled to one-half of the proceeds of the note and it was understood and agreed between all of the parties including the garnishee, Robinson, that Sherman's one-half of the proceeds of the note would be paid over to him (R. page 62). It was for this reason that Robinson was unable to take the short cut out of this lawsuit which the attorney for the joint petitioners undertook to get him to do in the letter written by the attorney on December 5, 1942. Knowing all of the facts as he did Robinson could not have answered the garnishment against him as suggested by Piper. Piper had suggested to him that "your answer in the Kopelove suit should be that you owe a note but that it is a negotiable note and hence that you do not owe the payee, but the holder and owner—and in this case, you know that such note was endorsed by Kopelove to Schear, and that Schear is the owner" (R. page 68). In other words, Piper had been misinformed by his clients, Schear and Kopelove, as to what took place and the suggestion made by him which he wanted Robinson to adopt as an answer simply was not the truth. As we have said, while Piper was evidently misinformed by Schear and

Kopelove, yet Robinson knew what the true facts surround ing the transaction were. Purporting to act as attorney fo the Circuit Court Clerk, the attorney representing Kope love and Schear became actively engaged in the Chancer Court litigation, filing several motions and notices (R. page 36, 37) and on April 9, 1943, after the amended and sup plemental bill had been filed by Sherman (R. page 39) th record discloses that the Attorney for Kopelove an Schear filed a motion to have the answer of the Circui Court Clerk treated as a petition to dissolve the injunctio (R. page 45). On April 8, 1943, a second amended and sup plemental bill was filed by Sherman (R. page 39) wherei it was alleged that the defendant, Schear, had filed a suit i the Second Circuit Court wherein he sought to claim owner ship of the partnership property in question and complain ant showed to the court that Schear had no interest in th note, but if he had any interest therein it would be in con nection with that portion of the note or that interest therei which was the property of the defendant, Kopelove, an if Schear did, in fact, purchase Kopelove's interest in th note that he took same with the full knowledge of the prio equities of Sherman and that such transfer of the note fro Kopelove to Schear would not operate to defeat Sherman' rights. That Schear is the brother-in-law of Kopelove that Schear and Kopelove have a common attorney, on Ralph Skilkin, and that Schear was present at the time th transaction was entered into between Max Robinson on th one hand and Sherman and Kopelove on the other (R. pag 40).

The second amended and supplemental bill furthe averred that since the filing of the original bill and the firs amended and supplemental bill that the balance due o the note representing the partnership asset was paid int the Registry of the Chancery Court by the bill of inte

pleader, and since the fund in controversy had thus been paid into the Chancery Court it is proper for Sherman to again come into Court by the second amended and supplemental bill and pray that the fund be held subject to the further orders of the Court and if proper that another attachment issue to be levied on the individual interests of the debtors in the fund. It was further averred that Sherman now had a further ground for the attachment of the proceeds by reason of the fact that the subject matter of the suit, i. e., the money attached, is impounded in the Chancery Court, in which Court the bill was originally filed and since the money is impounded in Court the necessity for a formal attachment was dispensed with (R. page 41). The bill prayed for publication for the two defendants and the Chancellor on April 8, 1943 (R. page 43) by fiat directed the Clerk and Master to hold the funds in Court and to attach them in his hands and to make publication for Schear and Kopelove as provided by law in attachment cases (R. page 43). Publication was again made for Kopelove and was made for the first time as to Schear (R. page 43, 44). On April 17, 1943, the Chancellor, having examined the pleadings and heard the argument of counsel with Attorney Piper participating therein among the other attorneys interested in the case, was of the opinion that the Circuit Court Clerk was not a proper party to make the defenses insisted upon by counsel purporting to act for her, and accordingly struck said motion to dissolve the injunction from the record (R. pages 46, 47). Thereupon, counsel representing Schear and Kopelove, but purporting to represent the Circuit Court Clerk, excepted and prayed an appeal to the Supreme Court of Tennessee, but provided that the appeal was denied (R. page 47). This order whereby counsel for Schear and Kopelove undertook to preserve exceptions in the name of the Clerk was entered on April 20, 1943 (R. page 47) and, therefore, it appears

indisputably from the transcript of the proceedings below that counsel for Schear and Kopelove, who is representing these petitioners in this Honorable Court, had full and complete knowledge and information about the case at bar from December 3, 1942, as indicated in the Piper letter of December 5, 1942 (R. pages 66-68), on through the time of the entry of the final decree and was actively engaged in the litigation in one guise or another during the entire period of eight or nine months while the litigation was progressing to final judgment in the Chancery Court.

In commenting on the facts appearing in the Record the Supreme Court of Tennessee observed in the Opinion filed on January 8, 1944, that the respondent, S. H. Robinson & Company, purchased the partnership contract from Sherman and Kopelove for $4500.00 represented by a note payable to Kopelove and this note was executed in the presence of Max Robinson, Sherman, Kopelove and Schear (R. 155). The Supreme Court further finds that complainant, Sherman, filed his bill in the Chancery Court on November 7, 1942, seeking to attach the balance of the money owed by Robinson to the partnership. The Court further said:

> "Thereupon the defendant Kopelove and his attorney made a trip to Knoxville to see Robinson about the settlement of the balance, and told Robinson that he (Kopelove) would settle with Sherman. Robinson testified that Kopelove and Sherman were partners.
>
> Not being able to see Sherman, Kopelove, his attorney, and his brother-in-law, Schear, returned to Ohio, and Schear, claiming that he had purchased the note from Kopelove, obtained a confessed judgment in Ohio. Then Schear, through his attorney at Knoxville, W. W. Piper, instituted a suit in the Circuit Court of Knox County on the foreign judgment and also on the note. S. H. Robinson & Company, Incorporated, then filed an answer and a bill of interpleader, and paid the amount of the note, approximately $2500, into the registry of the court.

> Thereupon Sherman filed an amended and supplemental bill attacking the transfer of the note as a fraud and made Schear a party defendant. Publication was duly made for Kopelove and Schear, and written notice of the suit was served on Mr. Piper, Schear's attorney of record in the suit in the Circuit Court." *Record pages 155-156.*

The petitioners in this Court filed a writ of error in the Supreme Court of Tennessee. The writ of error was filed not only for the purpose of testing the jurisdiction of the Chancery Court but also contained assignments of error which went beyond a mere attack on the jurisdiction of the Court and questioned the decree of the Chancellor on its merits. In the brief filed by Kopelove in the Supreme Court of Tennessee the last paragraph of assignment of error No. 5 went to the merits of the case (R. page 98). Likewise assignments 6, 7, 8 and 9 were not confined to the question of jurisdiction alone but questioned the action of the Learned Chancellor in awarding a judgment in excess of Twenty-Five Hundred ($2500.00) Dollars and in allowing an attorney's fee on the bill on interpleader in assignment No. 7, in failing to award interest on the note from November 1, 1942, in assignment No. 8 and in taxing as a part of the costs certain expense items incident to taking the depositions in assignment No. 9. (See Record page 98.) It, therefore, appears that these parties who filed the writ of error in the Supreme Court of Tennessee and who are petitioning for the writ of certiorari in this Honorable Court entered a general appearance in the Supreme Court of Tennessee and for this additional reason are not entitled to the granting of the writ.

Argument.

Summary of the Argument.

POINT A. Kopelove and Schear are proven conspirators to defraud Sherman by a fraudulent transfer of the note to Schear. Can Schear, a party to the fraud, enter a Tennessee Court in Knox County, the home of the respondents, invoke the aid of the Courts of Tennessee by suing at law on the note thus fraudulently obtained, and leave the Chancery Court of Tennessee powerless to protect the residents of Tennessee and prevent the perpetration of the fraud because of the mere fact of non residence of the defrauding parties?

POINT B. Kopelove and Sherman by filing the writ of error in the Tennessee Supreme Court and filing assignments going to the merits of the case as well as to the question of jurisdiction entered a general appearance and thereby conferred jurisdiction on their persons.

POINT C. Under Tennessee law the power or authority to confess judgment before an action is instituted is void and also under Tennessee law if the laws of a foreign state are not introduced in evidence, pleaded or at least proven in the lower Court, the law of Tennessee will govern and the presumption is that the law is the same as the law of Tennessee so far as they bear on the subject.

POINT A.

Schear by bringing suit in the Knox County Circuit Court as a part of the conspiracy with Kopelove was using the Tennessee Court for the purpose of furthering his fraud and to deny the jurisdiction of the Court of Equity under such a set of facts would be a denial of due process to the resident suitors, Sherman and Robinson. In support of the

foregoing point we respectfully call the Court's attention to the fact that the note signed by the Robinsons represented the sole asset of a Tennessee partnership composed of Sherman, a citizen of Tennessee, and Kopelove, a citizen of Ohio. Kopelove fraudulently transferred the note to Schear and at the time of the filing of the cross bill and interpleader by Robinson, the stake-holder, the original note had been proffered in the law cause in the Knox County Circuit Court, the prosecution of which had been enjoined and the proceedings in that suit were brought into the Chancery Court, so that the final decree of the Chancery Court operated as a cancellation of the note (Record page 73).

The case has been thoroughly litigated in the Courts of Tennessee, and as already stated, there is no substantial Federal question.

We believe that this Court will have no difficulty in finding from an inspection of all the pleadings, the process, the various appearances, publication notices and attachments, that the fund in question was in the custody of the Court not only under the statutory provisions relating to attachments but under the powers incident to the issuances of the extraordinary process by the Chancery Court. There is no showing on the part of the defendants that there has been any fraud or any advantage taken of them, but on the other hand the Record discloses that the petitioners in this Court are guilty of fraud and a conspiracy and did not come into the Tennessee Supreme Court with clean hands. (See Opinion Supreme Court of Tennessee, Record, page 157.) All of the questions raised by the petitioners herein in regard to the sufficiency of the attachment writs, publication notices and other process in Tennessee, were thoroughly gone into by the Tennessee Supreme Court and present no Federal question and the record shows a careful and substantial compliance with

the laws regarding attachments, publication notices, etc. The attachment laws of Tennessee are liberally construed. (Gibson's Suits in Chancery, sec. 878.)

POINT B.

When Kopelove and Sherman filed the Record for writ of error in the Tennessee Supreme Court they filed assignments of error going to the merits of the case as well as to the question of jurisdiction and thereby entered a general appearance and conferred jurisdiction on their persons.

In support of this point it is the respectful insistence of the respondents herein that in the Tennessee Supreme Court in the Kopelove brief the last paragraph of assignment of error Number 5 went to the merits of the case as did assignments 6, 7, 8 and 9 (see Record page 98). We submit that such an appearance is not special but is general, and where the defendant in addition to attacking the attachment writs also asks for other relief which can be granted only on the hypothesis that the Court has jurisdiction of the cause and person, the appearance is general and confers jurisdiction over the person (3 American Jurisprudence, pages 796, 797, 799). This is likewise the holding of the Supreme Court of Tennessee in the case of *Taylor* v. *Sledge*, 110 Tennessee, page 263.

Quoting in part from this case the Tennessee Court said:

> "We are, therefore, of the opinion that the complainant entered his appearance in the former case when he sued out the writs of error and supersedeas; that this Court thereby obtained jurisdiction of his person and its judgment against him is valid and conclusive of the matters therein adjudged although the original summons may not have been served upon him" *Taylor* vs. *Sledge*, *Supra*, page 268.

We are insisting upon the applicability of this point in the case at Bar because as pointed out in the statement of

the case the assignments of error of Kopelove and Schear were directed not only to the jurisdictional question but to matters involving the merits of the controversy.

POINT C.

It is respondents insistence that the laws of a foreign state if not introduced in evidence, pleaded or at least proven in the lower Court are presumed to be the same as the laws of Tennessee so far as they bear on the subject.

It was Schear's insistence in the Supreme Court of Tennessee that the rendition of the confessed judgment in Dayton, Ohio, was in conformity with the laws of Ohio regulating negotiable instruments and that Schear was the owner of the note by lawful negotiation. That Schear was the owner by lawful negotiation was denied by Sherman and, of course, goes to the merits of the case and is another indication of the fact that Schear and Kopelove by their assignments of error generally entered their appearance in the Tennessee Supreme Court. The Tennessee Supreme Court had no difficulty under the Record in finding that Schear and Kopelove were conspiring to defraud Sherman and the Courts of Tennessee reached a correct result. Under section 8848 of Williams 1932 Code any power or authority to confess judgment given before an action is instituted and before the service of process in such action is void and a judgment passed on such authority is likewise declared void. It is too well settled to require citation of authority that if the laws of a foreign state were not introduced in evidence, pleaded or at least proven in the lower Court, the laws of Tennessee will govern. See *Watkins* v. *Watkins*, 160 Tenn. 1, 10; *Flooring Co.* v. *Old Dominion Table Works*, 163 Tenn. 532, 534; *Bagwell* v. *McTighe*, 85 Tenn. 616.

The presumption is, in the absence of such formal proof in the trial Court, that the laws are the same as our own

so far as they bear on the subject. *North Memphis Savings Bank* v. *Union Bridge and Const. Co.*, 138 Tenn. 161, 193-194.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied. And, finally, the insistence made in petitioners brief that a money judgment was rendered against Kopelove is incorrect. The decree of the Chancery Court closely followed the form set out in *Higgins & Crownover's Tennessee Procedure, page 883, section 2250.* It is proper in the decree to recite the full amount of the judgment as shown by the proof; however, in the Tennessee form book alluded to, the judgment or decree recited that no execution would issue for the full amount of the judgment, and it is to be noted that in the Chancellor's decree no execution was awarded against Kopelove (See Record page 72).

The settled principles of Tennessee law as applied to the issues peculiar to the case at Bar control the acts of the Tennessee Court. There is certainly no intrinsic importance in the issues involved in this case requiring determination by the most authoritative Court in the land.

We respectfully call to the attention of the Court that counsel representing the respondents, Max Robinson and S. H. Robinson & Company, in the State Court, is now in the armed forces and it being a matter of joint interest of all respondents to secure a denial of the petition, this joint response is filed on behalf of all respondents.

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